IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 29 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

RAJESH D THAKKAR

Appearance:

MISS.SIDDHI TALATI, APP. for Appellant.

MR YS LAKHANI for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 17/11/2000

ORAL JUDGEMENT

#. The State of Gujarat has come up in appeal against the order dated 03.09.1991 passed by the Chief Judicial Magistrate, Kutch-Bhuj in Criminal Case No. 821 of 1988 whereby the respondents herein have been acquitted of the alleged offence punishable under

sections 7 and 16 of the Prevention of Food Adulteration Act.

#. On 28.11.1984 at around 15.45 hrs. one Shri R.V.Dodia, Food Inspector went to the shop of the respondent no.3 i.e. partnership firm Naranji Nenshi and Company located at main bazar, Kutch-Bhuj and in presence of panch witnesses purchased 300 grams. katho. The usual procedure for sending it to the Public Analyst was duly followed and accordingly one part in sealed bottle was forwarded on 29.11.1994 to Public Analyst, Kutch-Bhuj. On the same day i.e. on 29.11.1994, the remaining two parts of the sample were sent to the Local Health Authority. On receipt of the report of the Public Analyst, the Local Health Authority was approached seeking permission to prosecute. This application was made on 01.01.1988. Accordingly, on 15.01.1988, the Local Health Authority, Kutch-Bhuj had accorded his sanction and as a consequence thereof the present respondents were sought to be prosecuted under section 7 read with section 16 of the Prevention of Food Adulteration Act,1954 vide complaint dated 17.02.1988.

#. After hearing both the sides and taking into consideration the evidence on record and recording deposition of various witnesses, the Trial Court has acquitted the accused principally on two grounds. Firstly, it is held that at the time of forwarding the sample bottle to Public Analyst, Kutch-Bhuj, the Local Health Authority was not given the intimation statutorily required to be given as per provision of section 11(1)(c)(i) of the Act. Though it is stated in the oral deposition that such written intimation was sent to the Local Health Authority, the Trial Court has found as a matter of fact that no such written intimation seems to have been sent and there is no evidence to support the oral testimony of Shri P.V.Dodia, the Food Inspector. It is further found that the Prosecuting Authority viz. Shri L.A.Pathan, Food Inspector, has produced the list of documents but even in the said list there is no reference to the written intimation sent by Shri Dodia to the Local Health Authority. The Trial Court has thus held that the provisions of section 11(1)(c)(i) are mandatory provisions and in absence of compliance of the same it must be held that the prosecution has failed to prove its case to the hilt against the accused.

#. Secondly, the Court has come to the conclusion that the Local Health Authority who has granted consent to prosecute the accused has passed the order at Exh.39, which is illegal and defective. According to the Trial

Court the said consent order does not indicate that the consent is in public interest. Moreover, it does not indicate as to under which clause of section 2 is the offence committed by the accused under the Act and in such circumstances the complaint filed on the basis of such consent order cannot be sustained and in these circumstances, the prosecution has failed in establishing its case against the accused.

#. Taking up the second reasoning first, it can be stated that the same is no longer the correct view of the provisions of the Act and for this purpose, there are two direct decisions of this Court as well as one decision of the Apex Court and hence, we need not elaborately deal with this aspect of the matter.

[1] 1999 CRI. L.J.468
State of Maharashtra Vs. Gopalprasad Govindprasad Agarwal.

[2] 1988(1) GLR 214
State of Gujarat Vs. Imtiyaj Haji Abdul Sattar.

[3] 1991(2) GLH 615
Harshvadan Dahyalal Sevak Vs. Nareshbhai Devandas Vaghvani and another.

#. In so far as the first reasoning regarding provisions of section 11(1)(c)(i) viz. sending of intimation to the Local Health Authority being mandatory it need only be stated that we have two lines of authorities of different Courts taking contrary view of the matter. In 1984 CRI.L.J.198 the Bombay High Court has held that provision relating to intimation to Local Health Authority under section 11(1)(c)(i) is mandatory in nature and the Court would not be justified in taking the view that the legislature has made the provision for intimation to Local Authority of certain facts an empty formality. This decision of Bombay High Court has been specifically dissented from by the Kerala High Court in 1986 CRI.L.J.1001, wherein it is held that section 11(1)(c)(i) is only a directory and not a mandatory provision; and even complete violation of the said section cannot affect the success of prosecution because it is not mandatory provision, the non-observance of which will not cause any prejudice to the accused.

#. Section 11(1)(c) is reproduced hereunder for ready reference :

"(c) (i)send one of the parts for analysis to the Public Analyst under intimation to the Local (Health) Authority; and

(ii) send the remaining two parts to the Local (Health) Authority for the purposes of sub-section (2) of this section and sub-sections (2.A) and (2-E) of Section 13."

On bare reading it can be seen that before we go to sub-clause (i), sub-section (1) states "when a food inspector takes a sample of food for analysis, he shall ....." and thus showing that the use of the word 'shall' denotes its mandatory nature and between sub-clauses (i) and (ii) the word used is 'and' thus denoting that there is a conjunction between both the sub-clauses. The Food Inspector is thus required to carry out two different acts, viz. sending one part for analysis to the Public Analyst under intimation to the Local (Health) Authority, and secondly, send the remaining two parts to the Local (Health) Authority. Therefore, on bare reading of the provisions also the view taken by the Bombay High Court seems to be more commendable.

#. In view of what is stated herein above, the order of acquittal does not require to be disturbed on this solitary ground only and as stated, in any view of the matter, there being debate as to the true nature and scope of provisions of section 11(c)(1) of the Act, the accused must get the benefit when there are two interpretations possible.

#. The appeal is therefore dismissed.

Sd/-
(D.A.Mehta, J)

m.m.bhatt